DYNAMIC COALITION ON PLATFORM RESPONSIBILITY

PLATFORM REGULATIONS

Preview prepared by Luca Belli and Nicolo Zingales

This is the preview of the book "**Platform Regulations**",[1] which is the Official 2017 Outcome of the UN IGF Dynamic Coalition on Platform Responsibility (DCPR). DCPR is a multistakeholder group, established under the auspices of the United Nations Internet Governance Forum, dedicated to the analysis of the role and responsibilities of online platforms from a technical, legal, social or economic perspective. Since its inception, in 2014, DCPR has facilitated and nurtured a cross-disciplinary analysis of the challenges linked to the emergence of digital platforms and has promoted a participatory effort aimed at suggesting policy solutions. The Recommendations on Terms of Service and Human Rights,[2] whose development was facilitated by the DCPR in 2015, constitute a prime example of such efforts. The Recommendations represent a first crucial step in identifying criteria through which platforms' private orderings can be held accountable for their impact on users' fundamental rights to freedom of expression, privacy and due process. Nevertheless, more efforts of this type are needed to allow this discussion to include other rights, recognise the role of public policy, and define sound mechanisms guiding platforms in their balancing of conflicting rights and interests. While the extent to which this type of work should be conducted at the global, regional or national level remains one of the governance challenges of our generation, the urgency of this discussion can hardly be overstated.

Hence, this book offers a response to the DCPR's call for multistakeholder dialogue, made ever more pressing by the diverse and raising challenges generated by the *platformisation* of our economy and, more generally, our society. Despite the evident need to address these challenges, finding consensus and a sense of shared purpose is not always an easy task. For example, significant controversy exists concerning the very **notion of "platform,"** and the type of actors whose responsibilities should take the center stage in this discussion.[3] The above-mentioned DCPR Recommendations adopted a high-level definition, which is neutral as to the type of involvement in content creation or distribution, but refers to a specific type of intermediation that runs at the application and content layers, allowing users to "seek, impart and receive information or ideas according to the rules defined into a contractual agreement". This definition excludes *prima facie*, from this particular discussion, telecommunications companies and Internet Access Providers (IAPs), which remain at the core of other fora such as the Telecommunications Industry Dialogue and the Global Network Initiative. Nevertheless, as an attentive reader of the present volume will notice, legal developments on the rights and obligations of "upstream" intermediaries such as IAPs and domain name registrars (and registries) should be considered to the extent they inform, corroborate or anticipate the emergence of analogous legal issues "downstream". By way of example, the discussion arising from the pulling out of neo-Nazi content from certain domain name providers closely follows the thread of combating "**hate speech**" that has led to the adoption of similar measures by social media companies, and should therefore be considered as part of that broader tendency. Discussing in isolation from parallel developments at the upstream level carries the risk of missing important insights on legal remedies available to users affected by private measures, as is illustrated by the evolution of the legal framework concerning injunctions against innocent third parties in chapter 1.

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[1] The book is edited by Luca Belli and Nicolo Zingales and published by FGV Press. It includes two prefaces, authored by David Kaye and Julia Reda, and eleven chapters drafted by seventeen authors – specifically acknowledged throughout this document – who participated to the DCPR Call for Papers.

[2] The Recommendations on Terms of Service and Human Rights are annexed to this book and can be found at http://tinyurl.com/toshr2015

[3] For example, the relatively specific definition adopted by the European Commission in its consultations on online platforms – focused on the connection between two interdependent user groups – has been criticised for casting too wide regulatory net, catching a wide range of actors, business models and functionalities. Nor did the European Commission achieve more consensus with its narrower notion of "platforms making available large amounts of copyrighted content" identified as targets of heightened duty of care in the proposal for a copyright directive. Indeed, this latter definition triggering discussion as to the meaning of "large amount" and whether this should be defined (also) in relation to the profits made through the provision of access to such copyrighted material.

The increasing centrality of digital platforms, both, in the collection and processing of personal data and in the production and dissemination of content, has attracted growing political and regulatory pressure over rights and responsibilities that ought to be attributed to them; and expectations are increasingly being placed on the role of large platform operators to provide "**safe**" online spaces for user engagement. This trend is visible in the legislative proposals that have emerged in various countries demanding social media companies to prevent hate speech, incitement to violence or hatred, and "dangerous **terrorist** recruitment material." In such context, this volume aims at exploring the roles and responsibilities of digital platforms, fostering a better understanding of how such entities are shaping the evolution of the Internet.

Over the last year, one of the most visible manifest trends of platform regulation has manifested itself in the context of the identification and prevention of "**fake news**", stirring controversy over the role and impact of online platforms in the public sphere. This discussion offers a perfect example of a recurring problem with platform regulation: an important part of the content that is supposed to be prohibited escapes clear legal definition. It comprises a variety of different phenomena and, therefore, arguably requires a combination of a wide range of measures that should not be based on vague terminology. While some proposals have called for special legislation to restore trust and create a level playing field, major platforms such as Google and Facebook have been quicker in addressing those concerns, including structural responses and tools for users to limit their exposure to such misinformation.

A different but very similar problem has arisen regarding "**brand safety**", *i.e.* the concerns of advertisers in relation to the association of their ads with certain types of content deemed to be "inappropriate". In March 2017, following a letter by the Guardian and many brands pulling their ads from YouTube, Google announced to have heard concerns "loud and clear" and raised its bar for "hateful, offensive and derogatory content" which will be excluded from the association with Google ads. Important questions remain regarding the transparency, proportionality and effectiveness of the measures these companies have taken, and their impact on small and independent news providers and for content creators, some of whom (particularly those with content characterised as "sensitive") have seen their ad revenues dramatically reduced since Google adopted this revised policy.

In addition to these content-related trends, platforms are increasingly under the scrutiny of regulators for various concerns relating to **market power**, information asymmetry and use and collection of **data**. For example, the European Commission is considering the adoption of special legislation to assuage concerns of contractual exploitation towards small-medium enterprises, who are dependent on bigger platforms for access to customers. Exploitation is also a central concern of the criticism being levelled to platforms for their relationships with workers/employees, leading most recently to several tech companies drafting a code of ethics for worker values. Finally, there are multiple investigations on possible exploitation of personal data, relating both to their unlawful acquisition and their misuse leading to discrimination and consumer harm.

Against this backdrop, the need for a **multistakeholder discussion** on the role and responsibilities played by online platforms in our society becomes crucial. This book is built on the previous efforts of the DCPR and, although it does not pretend to offer definitive solutions, it provides some elements of reflection that should be carefully considered by all stakeholders in their effort to shape sustainable policies addressing shared problems regarding digital platforms.

Part I – Exploring the Human Right Dimensions

This first part of the book explores some of the most pressing challenges regarding the impact that public regulations targeting digital platforms and self-regulation developed by such entities may have on their users' fundamental rights.

In their opening chapter on "**Law of the Land or Law of the Platform? Beware of the Privatisation of Regulation and Police**," Luca Belli, Pedro Francisco and Nicolo Zingales argue that digital platforms are increasingly undertaking regulatory and police functions, which are traditionally considered a matter of public law. The authors emphasise that such functions have been growingly delegated to platforms by public

regulation while, on the other hand, platforms are self-attributing such functions to avoid liability, *de facto* becoming private cyber-regulators and cyber-police. After highlighting the tendency towards delegation of public functions to private platforms, Belli, Francisco and Zingales provide concrete examples of such phenomenon. For example, the chapter scrutinise three types of delegations of public power: the imposition of open-ended injunctions against innocent intermediaries, typically for content removal or website blocking; the implementation of the right to content delisting against search engines, also known as the "right to be forgotten"; and the enlisting of numerous IT companies into a voluntary scheme to counter "illegal hate speech". The authors show in all these cases that the amount of discretion conferred on platforms is problematic from the standpoint of the protection of individual rights. Furthermore, the paper reviews the parallel copyright regime developed by YouTube in order thereby emphasizing another collateral effect of the privatisation of regulation and police functions: the extraterritorial application of a national legislation – US copyright, in this case – which *de facto* turns the platform into a private proxy for global application of national regulation. The authors conclude highlighting some of the challenges and viable solutions for the protection of individual rights in an era of increasing privatisation of regulation and police.

In her chapter on "**Online Platform Responsibility and Human Rights**," Emily Laidlaw explores the human rights responsibilities of online platforms at the intersection of three areas: human rights, corporate social responsibility (CSR) and regulation. In this conceptual paper, Laidlaw untangles the governance problems in framing platform responsibility, focusing on the uneasy relationship between CSR and law, and identifying the difficulties in articulating what it means for a platform to respect human rights. The chapter highlights the benefits and challenges in considering CSR as part of the relevant regulatory framework, in particular when it comes to the implementation of the UN Guiding Principles on Business and Human Rights. She concludes by identifying three key challenges for the future of platform governance: defining appropriate (and where possible uniform) rules for intermediary liability; clarifying the scope of application of the duty of respect; and developing the linkage between alternative dispute resolution mechanisms and human rights.

In "**Regulation by Platforms: the Impact on Fundamental Rights**," Orla Lynskey points out that the relationship between platforms and regulation is two-fold: in addition to the various forms of regulation affecting platforms, the latter also constitute a regulator themselves through 'private ordering', with notable implications for economic, social, cultural and political dimensions of our lives. Lynskey explores, in particular, both direct and indirect ways that platforms influence the extent to which we can exercise our rights, and argues that these implications are exacerbated when these platforms are in a position of power -for instance because of the number of individuals that use them. Importantly, she suggests that competition law is not sufficient to constrain platform behaviour, in particular when it comes to addressing data power' (the power to profile and to exacerbate asymmetries of information) and 'media power' (the power to influence opinion formation and autonomous decision-making) which transcend the economic notion of market power. The chapter illustrates this point by reference to two examples (search engines and app stores) and concludes briefly identifying some of the options and challenges which policy-makers are confronted with in trying to tackle these issues.

In their chapter on "**Fundamental Rights and Digital Platforms in the European Union: a suggested way forward**," Joe McNamee and Maryant Fernandez emphasise that it is important to understand which actors we are addressing when referring to "digital platforms" because it may be counterproductive to categorise players as different as AirBnB, Google News and YouTube, to name but a few examples, as the same type of business. In this sense, the authors usefully suggest five classifications of platforms based on the relationship with consumers or businesses and based on the transactional nature of the relationship. Furthermore, this chapter notes that standard content guidelines of digital platforms do not necessarily respect the principle of legality or comply with fundamental human rights. In this regard, so called "community guidelines" often ban content, which is lawful and/or protected by European human rights law, often in an arbitrary and unpredictable way. McNamee and Fernández Pérez offer several examples of bad practice to corroborate their thesis and to conclude that, worryingly, neither governments nor Internet intermediaries appear to feel morally or legally responsible/accountable for assessing the durability or potential counterproductive effects that can be deployed by the measures that they implement. Importantly, the authors conclude the paper recommending the essential points that that future platform policies should incorporate in order to abide fully to the obligations prescribed by the Charter of Fundamental Rights of the European Union.

Part II – Data Protection and Use

The second part of this volume is dedicated to the analysis of one of the most crucial element concerning platform policies and regulations. The protection and use of individuals' personal data have crossed the borders of from privacy-focused discussions, growing to encompass an ample range of topics, including competition, property rights and the conflict with the collective right to access to information. The chapters included in this part provide a selection of analyses and some useful food for thoughts to identify priorities and ponder what regulatory solutions might be elaborated.

Krzysztof Garstka and David Erdos open this second part with an important reflection on the right to be forgotten from search engines, entitled "**Hiding in Plain Sight: Right to be Forgotten & Search Engines in the Context of International Data Protection Frameworks**." The authors note that, in the wake of *Google Spain* (2014) it has become widely recognised that data protection law within the EU/EEA grants individuals a qualified right to have personal data relating to them de-indexed from search engines, this is far from being a uniquely EU/EEA phenomenon. Through an analysis of five major extra-EU/EEA international data protection instruments, Garstka and Erdos conclude that most of those lend themselves to a reasonable interpretation supporting a *Google Spain*-like result. In light of the serious threats faced by individuals as a result of the public processing of data relating to them, they argue that the time is ripe for a broader process of international discussion and consensus-building on the "right to be forgotten". They also suggest that such an exercise cannot be limited to the traditionally discussed subjects such as challenging and d search engines), but should also encompass other actors including social networking sites, video-sharing platforms and rating websites.

The following chapter turns to the economic dimension of platform regulation, with Rolf Weber's analysis of the heated (but often misinterpreted) subject of "**Data ownership in platform markets**." Weber points out stressing that, while in the past platform regulations mainly concerned content issues related to accessible information and to provider responsibility, the growing debates about data ownership might also extend the scope of regulatory challenges to the economic analysis of platform markets. Relevant topics are collective ownership and data portability in the legal ownership context, as well as access to data and data sharing in case of an existing factual control about data. Weber opines that these challenges call for a different design of the author regulatory framework for online platform.

The question of data ownership is further explored by Célia Zolynski in "**What legal framework for data ownership and access? The Opinion of the French Digital Council.**" This chapter takes stock of the existing European debate and puts forward the approach of the French Digital Council (Conseil National du Numérique or CNNum). The Chapter is in fact a CNNum Opinion issued in April 2017 to respond to the public consultation launched by the European Commission on online platforms exploring various legislative and non-legislative options, including the creation of a property right over non-personal data, to encourage the free flow of data. First, the Opinion submits that value creation mostly occurs when data is contextualized and combined with data from other datasets in order to produce new insights. Thus, the issue is not to establish a hypothetical right of data ownership; rather, it is about thinking and designing incentive regimes of data access and exchange between data controllers so as to encourage value creation. Indeed, contrary to a widely-held belief, data ownership does not necessarily facilitate data exchanges - it can actually hinder them. Above all, the Opinion makes the argument that a free flow of data should be envisioned not only between member States, but also across online platforms. Importantly, the chapter highlights that these new forms of sharing are essential to the development of a European data economy.

Part III – New Roles Calling for New Solutions

This part scrutinises the conundrum created by the blurring of distinction between private and public spheres in some of the most crucial fields interested by the evolutions digital platforms. By exploring the challenges of regulation, terrorism, online payments and digital labour, this third part highlights the heterogeneity of roles that platforms are undertaking while stressing the need of policy solutions able to seize such diversity and properly addressing the underling challenges.

Marc Tessier, Judith Herzog and Lofred Madzou open this part with their chapter on "**Regulation at the Age of online platform-based economy: accountability, users' empowerment and responsiveness**." This paper expresses the views of the French Digital Council (CNNum) on the regulatory challenges associated with the development of the digital platform economy. This piece is part of a more comprehensive reflexion on online platforms policy-related issues developed by CNNUm since 2013, when the Council had been assigned the task to organise a consultation with the French plaintiffs involved in the Google Shopping antitrust investigation and made recommendations on policy issues posed by the rise of online platforms. Then in 2014, the former Prime Minister asked the Council to organise a national consultation to elaborate France's digital strategy. In this context, various market actors and civil society organisations reported their concerns about the lack of transparency regarding online platform activities and the asymmetry of power in their relationships with platform operators. To address these legitimate concerns, several recommendations were made; including the need to develop the technical and policy means to assess the accountability and fairness of online platforms. In 2016, following that recommendation, the government entrusted the Council with the task of overseeing the creation of an agency with these capabilities. In their contribution, Tessier, Herzog and Madzou discuss the challenges brought by the platform economy to our traditional regulatory tools, offering and a comprehensive policy framework to address them and the possible grounds for intervention of a potential Agency for Trust in the Digital Platform Economy

In her chapter on "**Countering terrorism and violent extremism online: what role for social media platforms?**" Krisztina Huszti-Orban highlights that social media platforms have been facing considerable pressure on part of States to 'do more' in the fight against terrorism and violent extremism online. Because of such pressure, many social media companies have set up individual and joint efforts to spot unlawful content in a more effective manner, thereby becoming the de facto regulators of online content and the gatekeepers of freedom of expression and interlinked rights in cyberspace. However, the author stresses that having corporate entities carry out quasi-executive and quasi-adjudicative tasks, outsourced to them by governments under the banner of self- or co-regulation, raises a series of puzzling questions under human rights law. In this perspective, this chapter outlines the main human rights challenges that are arising in the European context, regarding EU laws and policies as well as Member State practices. In Europe, the issues of terrorism and violent extremism online have become uppermost in the political agenda and, in such context, the author argues that the lack of internationally agreed definitions of violent extremism and terrorism-related offences raises the risk of excessive measures with potential cross-border human rights implications. Furthermore, Huszti-Orban analyses the problems arising from the attempts to broaden the liability of Internet intermediaries in the counter-terrorism context. Crucially, the paper emphasises the need to provide social media platforms with human rights-compliant guidance with regard to conducting content review, the criteria to be used in this respect and the specialist knowledge required to perform these tasks appropriately. The chapter also stresses the role of transparency, accountability and independent oversight, particularly considering the public interest role that social media platforms play by regulating content to prevent and counter terrorism and violent extremism.

In "**Revenue Chokepoints: Global Regulation by Payment Intermediaries**", Natasha Tuliko argues that payment intermediaries are becoming go-to regulators for governments and, in a recent development, for multinational corporations' intent on protecting their valuable intellectual property rights. More problematically, she stresses that those intermediaries that dominate the online payment industry (namely Visa, MasterCard and PayPal) can enact revenue chokepoints that starve targeted entities of sales revenue or donations and thereby undertake many of these regulatory efforts in the absence of legislation and formal legal orders, in what is commonly termed "voluntary industry regulation." In a case-study, Tuzlov explores why the U.S. government in 2011 pressured payment intermediaries into a non-legally binding enforcement campaign to protect intellectual property rights. Drawing upon interviews with policy-makers, intermediaries and right-holders, the chapter argues that governments strategically employ the narrative of "voluntary intermediary-led" in order to distance the state from problematic practices. Further, it contends that payment intermediaries' regulatory efforts are part of a broader effort to shape Internet governance in ways that benefit largely western legal, economic, and security interests, especially those of the United States. The conclusion is, in line with other contributions in this book, that intermediary-facilitated regulation needs some serious thinking and must take place within an appropriate regulatory framework, especially when payment providers act as private regulators for private actors' material benefit.

Finally, in "**Exploring the effectiveness of procedural safeguards in digital labour platforms to uphold user rights: A study on digital labour platform users in Sri Lanka**", Laleema Senanayake focuses on the safeguards provided by platforms that enable the matching of offer and demand for crowdsourced work. This chapter starts by pointing out that the platform economy has contributed to the rise of digital nomad workers – users who can work from anywhere in the world at any time they want- and to fundamental changes in the notions of work, buyer-seller relationships and employee protection. It then dives deeper into the system of private governance offered by these platforms to replace the traditional architecture, concerning the security of its employers and employees, by conducting an empirical review of the terms of service of major platforms for crowdsourced work. Subsequently, it contrasts those terms of service affirmed on paper with the diffused practices evidence by a survey of several selected group users, revealing the pervasiveness of forbidden actions such as sales of online accounts, use of alternative payment systems, exchanging of fake reviews and other measures which effectively circumvent the safeguards conceived by the rules of the platform for the benefit of its users. Senanayake concludes suggesting that there is uncertainty not only with regards to the duty of care owed by online platforms towards the security of their users, but also concerning the effectiveness of the obligations they impose and the platforms' ability to enforce their rules of engagement. It is not a coincidence that this chapter concludes precisely from the point where this discussion started: the widespread delegation of regulatory and police functions to private entities, without an adequate complement of rights and remedies available to secure the effectiveness of rights and obligations. As pointed out by virtually every contributor in this book, that is particularly problematic when platforms are in a position where they effectively decide the meaning, scope and level of protection of fundamental rights. This calls for a significant reflection on the goals of regulatory intervention in a platform society, and the role that private platforms can and should play in ensuring respect for individual rights.